Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

DR. KALEEM ARSHAD AND NADEEM S. ARSHAD, individually and on behalf of decedent, DR. JAMEELA ARSHAD,
Petitioners,

VERSUS

NICK CONGEMI In His Capacity As Chief Of Police For The City Of Kenner, CITY OF KENNER, KENNER POLICE DEPARTMENT, GERALD MILLER, RYAN KRUMMEL, KIMBERLYN BRIGHT, EMILE SANCHEZ and GEMINI INSURANCE COMPANY,
Respondents.

On Petition For Writ Of Certiorari to the United States Court of Appeals for the Fifth Circuit

ORIGINAL PETITION FOR WRIT OF CERTIORARI ON BEHALF OF PLAINTIFFS/ PETITIONERS

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QUESTIONS PRESENTED

I. Whether the lower Court erred in affirming the dismissal of the federal civil rights claims of the Petitioners on a motion for summary judgment in that the court's ruling went to the merits of the Petitioners' claim, the court appeared to weigh contradictory evidence, which is improper on a motion for summary judgment, and the court otherwise applied a more stringent standard in ruling on Motion for Summary Judgment.

II. Whether there is evidence that officers unlawfully arrested Dr. Arshad without any reasonable cause to do so and that the officers used excessive force in effecting the arrest.

III. Whether police officers had knowledge of the danger associated with arresting a person in the manner in which Dr. Arshad was arrested, and the knowledge that such an arrest presented a substantial risk of death, such that officers on the scene acted with deliberate indifference with regard to the rights of Dr. Arshad in their post-custodial care when they locked her in the back of the police cruiser and abandoned her, and failed to maintain eye contact with her as set forth in the Kenner Police Manual.

IV. Whether the lower Courts improperly weighed contradictory evidence in finding that there was no official policy and/or custom of the city of Kenner in arresting physicians at accident scenes.

The Supreme Court Of
The United States Of America

DR. KALEEM ARSHAD, et al.,

VERSUS

NICK CONGEMI, et al.

PARTIES TO THIS PROCEEDING

Petitioners

DR. KALEEM ARSHAD;
NADEEM S. ARSHAD

Respondents

NICK CONGEMI In His Capacity As Chief Of Police For The City Of Kenner;
THE CITY OF KENNER;
KENNER POLICE DEPARTMENT;
OFFICER GERALD MILLER;
OFFICER RYAN KRUMMEL;
OFFICER KIMBERLYN BRIGHT;
SERGEANT EMILE SANCHEZ; and
GEMINI INSURANCE COMPANY

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OPINIONS BELOW

This matter comes before this Honorable Court from the United States Court of Appeal for the Fifth Circuit. Petitioners originally filed the present matter in the United States District Court for the Eastern District of Louisiana on January 6, 2006, bearing docket number 2:06-cv-00059. The respondents filed a motion for summary judgment on October 15, 2007, which came on for hearing on December 12, 2007. The District Court granted the motion, dismissing all federal claims with prejudice and dismissing the state claims without prejudice. Petitioners then filed a notice of appeal to the Fifth Circuit Court of Appeal on January 11, 2008, bearing appellate docket number 08-30061. Oral arguments were heard on February 2, 2009, and an opinion was handed down on March 9, 2009, affirming the district court. Petitioners filed an Application for Rehearing within the legal time delays, and the Court of Appeal denied rehearing by order dated April 14, 2009.

STATEMENT OF JURISDICTION

The present suit was originally filed in the United States District Court for the Eastern District of Louisiana as a cause of action arising under the laws of the United States, specifically 42 U.S.C. §1983, along with pendant state law claims. As such, the District Court had original jurisdiction over the petitioners' claims, and supplemental jurisdiction over the state law claims pursuant to 28 U.S.C.

§1367. Petitioners appealed the trial court's judgment dismissing the case to the United States Court of Appeals for the Fifth Circuit, which Court had jurisdiction pursuant to 28 U.S.C. §1291 *et seq.* This Petition for Writ of Certiorari follows from the Court of Appeals' decision, and this Honorable Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Eighth Amendment provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law"

42 U.S.C.A. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Course of Proceedings

Dr. Jameela Arshad, a respected and talented

neurologist and emergency room physician at Kenner Regional Hospital near New Orleans, Louisiana, ***died*** after being wrongfully arrested, forcefully detained, and abandoned in the back of a police cruiser with the windows rolled up and the doors locked. Dr. Arshad had stopped voluntarily to render emergency medical assistance to a young boy who was struck by a car on Williams Boulevard in Kenner, Louisiana. She acted not out of greed but out of the kindness of her heart because she was a physician, duty sworn to protect life. Kenner Police officers arrived at the scene and, for no lawful cause, pulled Dr. Arshad away from the child, and violently arrested her. The method in which she was arrested, and the horrible post-custodial care she received, caused her death.

Dr. Kaleem Arshad, the husband of Dr. Jameela Arshad, and Nayeem Arshad, Dr. Arshad's son, filed the present lawsuit on or about January 6, 2006, alleging civil rights violations, under 42 U.S.C. §1983, including wrongful arrest, excessive force, deliberate indifference, and negligence against various Kenner Police officers. Additionally, the City of Kenner was named, on the grounds that they are vicariously liable for the civil rights violations because they had an official policy of wrongfully arresting physicians. On October 15, 2007, the defendants/respondents' filed a Motion for Summary Judgment, which came on for hearing on December 12, 2007, before the Honorable Jay C. Zainey. The district court granted the motion, and dismissed all of the Petitioners' federal claims with prejudice, and,

declining jurisdiction over the state law negligence claims, dismissed the state claims without prejudice. Petitioners appealed to the U.S. Court of Appeal for the Fifth Circuit, which affirmed the trial court's judgment. It is from these rulings that the Petitioners come before this Honorable Court.

B. Statement of the Facts

Dr. Jameela Arshad, a respected African American, female physician, enjoyed living in Kenner, Louisiana, a relatively peaceful suburb of the city of New Orleans. She enjoyed her work at the local hospital, and she was a kind and gracious woman. However, when she was attempting to render aid to a young accident victim, the cries of this black woman, insisting she was a physician and she was in control of the scene, were ignored by mostly white, male Kenner Police officers and citizens. She was singled out for no good reason, dragged away from her patient, arrested, manhandled, mistreated, and left alone to die in the back seat of a locked police car. Petitioners have alleged that the race and gender of Dr. Arshad were motivating factors in her unlawful arrest. There is evidence that the other responders to the accident scene ignored Dr. Arshad, refusing to believe that she was a physician, while no one questioned the white man who claimed, without any validation, that he was a firefighter/EMT. No one tried to remove him from the scene. There is also evidence that police officers in Kenner have promulgated a policy of summarily arresting, without probable cause,

licensed physicians trying to render aid at accident scenes. The medical community is outraged, and national medical associations have voiced indignation over the arbitrary and capricious policy of the Kenner Police Department. If this blatant violation of Constitutional principals is allowed to persist, it can have serious public policy implications, discouraging competent medical professionals from ever assisting injured citizens in an emergency situation. The evidence presented suggests that one of these improper considerations: race, gender or her status as a physician, was the basis for arresting Dr. Arshad, clearly without probable cause. She was merely trying to render aid, but no one wanted to listen to Dr. Arshad at the scene, and the Courts below have turned a blind eye to the evidence presented and have chosen to dismiss this case on summary judgment, despite the obvious issues of fact presented.

On January 10, 2005, Dr. Arshad was driving down Williams Boulevard in Kenner, on an errand for her son, Nadeem Arshad. As she approached West Esplanade, she witnessed a vehicle strike a pedestrian on a bicycle, sending the young rider flying through the air. Dr. Arshad, who was a neurologist on staff at Kenner Regional Hospital, immediately stopped her vehicle, and ran to the child's aid.

When she arrived at the boy's side, and began in her attempts to deliver emergency medical care, another witness to the accident appeared, Robert

Evans, a white man, who claimed to be an emergency medical technician (EMT). Mr. Evans immediately began asking Dr. Arshad questions about her qualifications, and Dr. Arshad continuously replied that she was a physician, and that it was "her scene."

Officer Ryan Krummel, a Kenner Police officer, was at the same intersection, and he likewise responded immediately. Within seconds of the arrival of Dr. Arshad and Mr. Evans at the child's side, Officer Krummel approached, and Dr. Arshad informed him that she was a physician and it was "her scene."

A few minutes after Krummel's arrival, another Kenner Police officer, Gerald Miller, reported to the scene. When he walked up to the accident scene, he saw the child lying in the street, and he saw Krummel, whom he knew, and a white male and black female in civilian attire, neither of whom he knew, kneeling near the child. The scene appeared calm and under control as he approached.

When Miller approached, Evans instantly complained that Dr. Arshad, who claimed she was a physician, wouldn't show her credentials to Evans. Miller immediately, and arbitrarily, demanded that Dr. Arshad show him her credentials or else she couldn't touch the child. When Dr. Arshad replied that she didn't have credentials on her person at the time, Miller ordered her to step away.

However, Dr. Arshad had a moral and ethical duty as a physician to render aid to the injured victim, whether or not she had her ID badge with her. Furthermore, she had already claimed the scene, thereby triggering a legal duty to administer care to the child. As such, she returned her attention to the child. Unprovoked, Miller then grabbed her, and forcefully attempted to restrain her, and it was at this point that a "seizure" had occurred. According to Miller, Dr. Arhsad then pulled her arm free, and immediately returned her attention to the victim.

At this point, Dr. Arshad had broken no law, ordinance, rule, regulation or otherwise provided any legal basis for arrest. Regardless, Miller forcefully grabbed her, and yanked her away from the injured boy. Dr. Arshad resisted, which she had an absolute right to do, as it was clearly an unlawful arrest. She repeatedly informed the officer that she was a physician and it was her scene, and she continuously tried to return to her post alongside the victim. Because she insisted on trying to help the injured child, Officer Miller swept her legs out from under her, slammed her face-down on the pavement, kneeled on her back, and cuffed her behind her back, thereby completing the wrongful arrest.

After she was cuffed, Miller shoved Dr. Arshad in the back of a nearby police cruiser belonging to another Kenner Police officer, Kimberlyn Bright. The windows were rolled up, and there was no ventilation. Once she was inside, Miller locked the

car, and both Miller and Bright walked away, neither of them ever looking back or checking in on Dr. Arshad. In fact, no one was checking in on Dr. Arshad. No one spared Dr. Arshad a thought until nearly 10 minutes had passed. At that point, another officer, John Louis, just happened to wander past the vehicle and by chance he glanced inside and saw Dr. Arshad foaming at the mouth.

Louis then nonchalantly asked who pepper-sprayed the lady in the car. Miller responded that no one had, and he went to check on his prisoner for the first time. However, when he got to the car he realized that he didn't have a key to open the door to help Dr. Arshad, who was now clearly in serious distress. Officer Bright, who was all the way across the street directing traffic, had to be radioed to come unlock the door, which wasted precious minutes. Paramedics examined her while she still sat in the back of the cruiser, hands cuffed, unresponsive. Finally, several minutes after officers accidentally noticed her distress, a paramedic, Kenneth Padgett, told the officers to uncuff her and take her out of the car. But it was too late. Dr. Arshad died from cardio-pulmonary arrest as a result of positional asphyxia.

The plaintiffs' medical expert, Dr. Javed Suleman, opined that several factors combined to cause Dr. Arshad's death, including the manner in which she was arrested, with use of aggressive physical maneuvers, especially considering her weight, restraining her face down, with the weight of

the officer applied to her back, leaving her handcuffed behind her back in a locked vehicle with no ventilation and no one to observe her for almost 10 minutes, all of which led directly to significant asphyxia, which in turn led to cardio pulmonary arrest. Dr. Suleman stated that, had she been properly attended, her distress would have been recognized in a timely fashion, and Dr. Arshad, more likely than not, would have survived.

There is ample evidence that the officers acted with deliberate indifference to the rights of Dr. Arshad once she was placed under arrest and thrown in the back of the police cruiser, including expert testimony from plaintiff's liability expert Dr. Gould, who stated that the officers actions were unreasonable. Officer Miller simply wanted nothing to do with her anymore, and so he threw her into an unventilated and locked car, with her hands bound securely behind her back, to shut her up. This treatment is directly contrary to the Kenner Police Department's own written policies and procedures. The Operations Manual (FSOP 7-2.2) states specifically:

> * "When possible, do not place a prisoner in a hot or closed up vehicle. As soon as possible provide ... adequate ventilation ...
>
> *Do not leave the prisoner unattended in a closed vehicle. If a prisoner is placed in a vehicle, ***an officer should***

> ***be assigned to constantly observe him/her...***
>
> * In situations involving extreme physical exertion . . . The officers should ... allow the arrestee an opportunity to regain his/her breath prior to placing him/her in a transport vehicle.

These rules are designed for exactly this type of arrest, where there is a full restraint of the prisoner and a stressful and violent detention. The rules are designed to prevent positional asphyxia, especially in an obese person, which is exactly what Dr. Arshad suffered from. The testimony of all the witnesses establishes that the officers disregarded every one of these rules. Thus, the police department's own practices and procedures, developed to ensure the safety of arrestees/ detainees, were completely ignored, and there is at least an issue fact as to the officers' subjective knowledge that their actions created a substantial risk of harm to Dr. Arshad.

Furthermore, through discovery, appellants came across a letter written by then-Chief of Police, Nick Congemi to the Kenner Fire Chief, Michael Zito, dated June 20, 2003. In that letter, Congemi states, unequivocally:

> "The Kenner Police Department will continue to relinquish all

> [medical] care to . . . Emergency Medical Technicians upon their arrival . . . [W]***e have arrested licensed doctors who have attempted to interfere with Emergency Medical Technicians. We will continue to do so . . .***"

Of further interest, Petitioners presented evidence from Dr. Hasad Abdallah, who was the victim of a strikingly similar unwarranted attack in 2000, when he was trying to render emergency medical service to a severely injured accident victim. While he was trying to inform EMT's of possible complications, Dr. Abdallah was thrown down, pepper sprayed, and arrested. Thus, the Petitioners insist there is evidence in the record establishing an official policy on the part of the Kenner Police Department of wrongfully arresting and forcibly removing physicians from accident scenes.

Accordingly, there is ample evidence that officers wrongfully arrested and used excessive force on Dr. Arshad in violation of her civil rights. There is ample evidence that the police officers, including Miller, Krummel, Bright, and Sgt. Emile Sanchez, acted with deliberate indifference to the rights of Dr. Arshad once she was wrongfully arrested. There is also clear and convincing evidence that the Kenner Police Department had an official policy of summarily and wrongfully arresting physicians. The lower courts failed to take ANY of this evidence into

consideration in ruling on the defendant's Motion for Summary Judgment, which was reversible error. For these reasons, as set forth fully hereinafter, Petitioners respectfully request that this Honorable Court GRANT the present Petition for Writ of Certiorari and REVERSE the rulings of the lower courts.

ARGUMENT

I. THE COURTS BELOW ERRED IN SUMMARILY DISMISSING PETITIONERS' WRONGFUL ARREST AND EXCESSIVE FORCE CLAIMS UNDER 42 U.S.C. §1983 AS THE COURTS' RULINGS WENT TO THE MERITS OF THE PETITIONERS' CLAIM, THEY APPEARED TO WEIGH CONTRADICTORY EVIDENCE, AND THE COURT OTHERWISE APPLIED A MORE RIGOROUS STANDARD IN RULING ON A MOTION FOR SUMMARY JUDGMENT

Petitioners have asserted several federal civil rights claims against the defendants/respondents, specifically alleging violation of 42 U.S.C. 1983 for for use of excessive force in effecting an unlawful arrest. There was ample evidence presented that points out the existence of material factual disputes in this case, which must be resolved by the trier of fact, and therefore summary judgment was inappropriate. However, the Courts below turned summary judgment procedure on its head and chose to weigh evidence and credibility of witnesses and

decide the case on the merits. The rulings produced, therefore, were clearly erroneous, and should be REVERSED.

The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the nonmoving party's case. *Celotex v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). After a proper motion for summary judgment has been made, a nonmovant must merely bring forward sufficient evidence to demonstrate that a genuine issue of material fact exists for every element of a claim. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1196 (5th Cir.1986). For summary judgment purposes, all evidence produced by the nonmovant is taken as true and all inferences are drawn in the nonmovant's favor. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S.Ct. 1598, 1609-10, 26 L.Ed.2d 142 (1970); *Pitts v. Shell Oil Co.*, 463 F.2d 331, 335 (5th Cir.1972).

42 U.S.C.A. § 1983 imposes liability for violation of rights protected by the United States Constitution. *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). The infliction of personal injury on a person by police under color of state law may deprive the victim of liberty without due process of law, in derogation of his rights under the fourteenth amendment, thereby allowing recovery of damages under § 1983. See *Jones v. Hildebrant*, 432 U.S. 183, 97 S.Ct. 2283, 53 L.Ed.2d 209 (1977); *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir.1981); *Hall v. Tawney*, 621 F.2d 607 (4th

Cir.1980); *Johnson v. Glick,* 481 F.2d 1028 (2nd Cir.1973).

The actions of Kenner Police Officers and the actions of the chief of police, Nick Congemi, violated Dr. Jameela Arshad's civil rights. First and foremost, officers detained, arrested and harassed Dr. Arshad ***without any legal basis whatsoever***, i.e. without probable cause or reasonable suspicion, thus committing a false arrest and/or imprisonment which unconstitutionally deprived Dr. Arshad of her liberty. Additionally, officers used excessive force to arrest Dr. Arshad, including forcefully dragging her away from the accident scene, throwing her on the ground, cuffing her behind her back and dumping her in the back of a locked police cruiser without adequate ventilation.

The testimony of the witnesses, ***including that of the injured pedestrian himself***, established the unreasonable actions of the Kenner police officers in their wrongful arrest and detention of Dr. Arshad, which certainly establishes the existence of an issue of material fact sufficient to preclude the granting of summary judgment. There is evidence that the police officers' unreasonable actions caused an otherwise calm and controlled accident scene to escalate into a tense situation. There is evidence that Dr. Arshad was singled out due to improper considerations, including race, gender, and her status as a physician.

The Petitioners have clearly demonstrated

that there are genuine issues of material fact concerning the liability of the defendants for violation of Dr. Arshad's civil rights. Accordingly, the motion for summary judgment should have been DENIED, and the rulings of the lower courts should therefore be REVERSED.

1. Qualified Immunity Does Not Apply to the Actions of the Police Officers Since by Their Own Admissions There was Never Any Reason to Arrest Dr. Arshad

The lower courts' erroneous decision in this case, at least as it concerns the Fourth Amendment unlawful arrest and excessive force claims, was based in large measure on the doctrine of "qualified immunity". In granting the Motion for Summary Judgment, the Courts held that the police officers were entitled to a qualified immunity defense because there was a reasonable basis for their unlawful arrest of Dr. Arshad. However, the court failed to take into account the serious issues of fact concerning the incident, and seemed to wholly disregard the testimony of several witnesses, who all stated that Dr. Arshad appeared to have done nothing wrong prior to being manhandled by Officer Miller. The officers had no reasonable basis for harassing Dr. Arshad, for singling her out, for dragging her away from a patient under her care, and for violently arresting her. As such, the officers did not act in good faith, and are not entitled to qualified immunity.

The Fourth Amendment requires that an arrest be supported by a properly issued arrest warrant or probable cause. The officers are entitled to qualified immunity for the arrest ***only*** if "a reasonable person in their position could have believed he had probable cause to arrest". *Goodson*, 202 F.3d at 740. In particular, the "arrest must be based on probable cause, which exists 'when the totality of the facts and circumstances within a police officer's knowledge ***at the moment of arrest*** are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense.'" *Spiller v. Texas City*, 130 F.3d 162, 165 (5th Cir. 1997)(emphasis added).

In the present case, there was no probable cause to believe that Dr. Arshad had committed, was committing or was about to commit any offense. Dr. Arshad witnessed a young child on a bicycle being struck by a vehicle. Dr. Arshad was a licensed neurologist and emergency room physician at Kenner Regional Hospital, and she was therefore qualified and duty-bound to stop and render aid. She was the first on the scene, and she immediately began treating the child in a professional manner, as testified to by the child himself.

When the first officer arrived, Dr. Arshad and Robert Evans were already kneeling down beside the victim attempting to render assistance. Mr. Evans was holding the child's head in his hands, and Dr. Arshad was attempting to perform an examination of the boy. Officer Krummel testified that he did not

notice anything out of the ordinary with the situation at that point, except that Evans kept arguing with Dr. Arshad about providing credentials.

When Officer Miller arrived at the scene, however, the situation changed. First and foremost, it should be noted that Officer Miller did not notice anything out of the ordinary when he approached. The scene was calm, Dr. Arshad was examining the boy, Mr. Evans was holding the boy's head, and Officer Krummel was quietly kneeling down nearby. When Miller arrived at the scene, Evans told him that Dr. Arshad would not shown her credentials before rendering assistance to the patient, and Miller arbitrarily demanded that Dr. Arshad show some credentials. Dr. Arshad said that she did not have her credentials on her person at the time, but she was a doctor and she was going to assume responsibility for the care of the child.

Kenneth Padgett, Director of Emergency Management for the Parish of Jefferson, testified that the procedure for attending to an accident scene, when a physician is present and does not have credentials, is for emergency personnel to give that person respect as a doctor and call Medical Control to verify his or her identity.

Thus, the defendants' own witness, a paramedic and Director of Emergency Services for the Parish of Jefferson, testified that emergency personnel ***should surrender an accident scene to a physician, whether or not they physically have***

credentials available. The duty of emergency personnel in that situation would be to call Medical Control to verify that the person is a physician. Here, the Court erroneously accepted the argument of the officers that Dr. Arshad's inability to produce credentials was a reasonable basis for arresting her. However no one has pointed to any law, ordinance, regulation or otherwise establishing that as a valid reason to arrest, and the medical scene should have been surrendered to the most qualified individual there, Dr. Arshad.

Officer Miller obviously did not appreciate his authority being questioned, and he therefore grabbed Dr. Arshad's arm and forcefully pulled her away from the child. At this point, Dr. Arshad resisted, pulled her arm free, ***and immediately returned to caring for the patient***. She reasonably reacted to Miller's unjustified intrusion into her care of the child, a responsibility she most certainly considered more important than the I.D. he demanded. However, after Dr. Arshad pulled away from Miller, the situation deteriorated. Officer Miller grabbed Dr. Arshad a second time, dragged her away from the scene, and violently arrested her. For what? Even a year after the incident, Officer Miller could not articulate a reasonable basis for his actions at that point. What the defendants relied on in their argument is the simple fact that the resulting pandemonium justified the earlier aggressive actions of Officer Miller. The lower courts erroneously bought into this line of thinking.

While a plaintiff in a 1983 action bears the burden of proof, just as does the plaintiff in any other civil action, once the plaintiff shows that the arrest was without a warrant, the burden of persuasion to establish probable cause shifts to the arresting officer. *Manuel v. United States*, 355 F.2d 344 (5th Cir. 1976). Probable cause for an arrest is a matter of federal constitutional law, not state law. *Hamilton v. Chaffin*, 506 F.2d 904 (5th Cir. 1975); *Gandy v. Panama City*, 505 F.2d 630 (5th Cir. 1974); *Martin v. Blackburn*, 581 F.2d 94 (5th Cir. 1978). The probable cause burden which defendant bore was to demonstrate that at the moment the arrest was made, the facts and circumstances within his knowledge were sufficient to warrant a prudent man in believing that plaintiff had committed or was committing an offense. *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975).

A battery committed upon a police officer (or anyone else) certainly constitutes a violation of state law and certainly would constitute probable cause for immediate arrest. However, just as the Court held in *Adams v. Thompson*, 557 F.Supp. 405 (D.C. La. 1983), "[s]ince there was no probable cause for her arrest, [plaintiff], under both federal and state law, ***was entitled to resist the unlawful arrest.***" *United States v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948), *State v. Lindsay*, 388 So.2d 781

(La. 1980); *White v. Morris*, 345 So.2d 461 (La. 1977); *City of Monroe v. Ducas*, 203 La. 971, 974, 14 So.2d 781 (1943); *State in the Interest of Lewis*, 386 So.2d 1079 (La. App. 3rd Cir. 1980); case note, 38 Louisiana Law Review 840 (1978), The Right to Resist Unlawful Arrest. "Her resistance, even physical resistance, to the [officer]'s unlawful arrest can not provide probable cause for her arrest."

In the case of *Ross v. Sheriff of Lafourche Parish,* 479 So.2d 506 (La. App. 1 Cir. 1985) the Court found that a plaintiff had not done anything to "arouse a suspicion that he had committed, was committing, or was about to commit an offense," even after he made disrespectful remarks to police officers. The Court held that even though the plaintiff's comments may have angered the officers "as an affront to their authority", it was not a valid reason to arrest. See also *City of New Orleans v. Lyons*, 342 So.2d 196 (La. 1977); *State v. Meyers*, 462 So.2d 227 (La. App. 4th Cir. 1984).

It was suggested that Officer Miller was trying to prevent Dr. Arshad from committing a battery on the injured child because it looked like she was about to touch him. Mr. Evans, the white firefighter, was ***holding the child's head in his hands***, yet no one ever asked to see Evans' credentials, no one ever told Evans not to touch the child, and no one ever attempted to pull Evans away from the scene. So how was Dr. Arshad attempting to commit a battery by trying to touch the child, while Evans was never questioned for having his hands all over the child?

Furthermore, under Louisiana law, Dr. Arshad could not have been attempting to commit a battery. La. R.S. 14:33 defines a Battery as "the intentional use of force or violence upon the person of another." It has been held that to establish a battery, it must be shown that the actor intended to inflict an offensive contact to the person of another without the other's consent. *Lowrey v. Pettit*, App. 2 Cir.1999, 737 So.2d 213, 31,881 (La. App. 2 Cir. 1999). The victim himself, James Robinson, testified that Dr. Arshad never attempted to injure him or make an offensive contact with him. In fact, he ***appreciated*** the fact that she was trying to help him and he couldn't understand why police officers were trying to prevent her from doing so! Accordingly, this "basis" provided by the police officers is purely pretext, developed after the fact in an attempt to fabricate probable cause.

The simple fact of the matter is that there was never any reason to detain, arrest, or even touch Dr. Arshad. She was performing her duty as a physician in rendering aid to an injured child, and she was doing it peacefully. It was never Dr. Arshad's intention to fight with police officers. Even Officer Miller agreed that after she pulled away from him the first time, she did not attack him. She merely turned back to the child. Her lawful resistance, then, cannot be used to establish probable cause because there was no probable cause for the initial seizure or detention.

Petitioners have put forth evidence, including an affidavit from the injured pedestrian himself, the testimony of Officer Miller, the testimony of Officer Krummel, and the testimony of David Dodge, showing that Miller never had any probable cause to arrest Dr. Arshad. Certainly the testimony at least establishes the existence of an issue of material fact sufficient to preclude the granting of summary judgment. When taken in the light most favorable to the petitioners, it is clear that a jury could find that Miller improperly harrassed Dr. Arshad, singled her out based on suspect considerations, dragged her away from a patient under her care, and violently arrested her without any reasonable basis for doing so, proving that the officers did ***not*** act in good faith, that Miller's actions were ***not*** objectively reasonable, and the officers are otherwise ***not*** entitled to qualified immunity.

In its opinion, the Court of Appeals stated that Miller "ordered Dr. Arshad, dressed in plainclothes, to present identification. Dr. Arshad repeatedly refused to move; refused to present identification; became agitated; insisted several times that it was her scene; and attempted to place both hands on the boy. Only after all of that had occurred did Officer Miller grab her arm..." However, their opinion ignores the evidence presented by petitioners showing that Dr. Arshad did not "refuse" to present identification, but that she simply did not have her identification on her person at the time; that Dr. Arhsad did not become agitated until ***after*** Officer Miller engaged her; and that at the time he placed

his hands on Dr. Arhsad, she had done nothing wrong. Additionally, while the Court stated that Miller's actions were objectively reasonable "in light of the chaos of the accident scene," Petitioners submit that the scene was ***not*** chaotic, but was calm and controlled at the time Miller initially grabbed Dr. Arhsad. Petitioners insist that the lower Courts improperly weighed the conflicting evidence in this matter in finding that Officer Miller's actions were reasonable.

In an analysis assessing the Constitutionality of the officers' actions, the question that must first be answered is what basis did Officer Miller have to initially grab Dr. Arshad and prevent her from treating the patient? At the time that Miller seized her, ***she had committed no crime***. Under any

standard of reasonableness, if you believe the evidence presented to the lower courts by the Petitioners, probable cause never existed to arrest Dr. Arshad or even touch her. The officers fabricated probable cause after the fact based on Dr. Arshad's lawful resistance of an unlawful arrest. And while the lower courts seemed concerned with Dr. Arhsad's statement that it was "her scene", appellants have pointed out that such a statement was not meant as a pompous declaration of superiority by Dr. Arhsad, but is a medical term of art which indicates that Dr. Arshad had assumed responsibility for the care of the injured victim.

The Lower Court also suggested that probable

cause ***may*** have existed for Miller to arrest Dr. Arhsad based on La. R.S. 14:332(A), which prohibits the intentional interference with an emergency medical technician. Appellants first submit that the Court of Appeal raised this issue on its own, and that no party or witness has ever suggested that Miller acted in reliance on this statute. Furthermore, the evidence clearly shows that this statute was never implicated in this matter because the only person Dr. Arshad was "interfering" with was Robert Evans, the ***off-duty*** (white, male) firefighter that responded contemporaneously with Dr. Arshad. However, it has been pointed out numerous times that Mr. Evans had nothing on his person identifying him as an EMT, presented no identification or credentials, and nobody on the scene knew Mr. Evans or knew him to be an off-duty EMT (and Mr. Evans testified that he was NOT an EMT, but was a firefighter with basic EMT training and had previously worked as an EMT dispatcher). In fact, it has been pointed out, in support of appellants' argument that Dr. Arshad was singled out based on some suspect classification, that Evans, the white, male, off-duty fireman/former EMT dispatcher, was never asked to present credentials even though he was holding the child's head in his hands, while Dr. Arshad, the black, female neurologist, was dragged away, arrested, and mistreated for her failure to produce such credentials while she was simply "trying to touch the child"! Therefore, there is no way that Dr. Arshad "willfully" interfered with an EMT, since she had no way of knowing that Evans was an EMT in the performance of his duties, and in fact, Mr. Evans was ***NOT*** an

EMT, but an off-duty firefighter. Furthermore, this could not be a basis for establishing probable cause, because Officer Miller never suggested that he arrested her for violation of that statute, and a probable cause determination cannot be made after the fact.

For all these reasons, your Petitioners insist that sufficient evidence was presented to the lower courts which clearly establishes a material factual dispute in this case. There is evidence which suggests that officers acted without probable cause and with improper reliance on suspect classifications when they arrested Dr. Arshad. There is evidence that Dr. Arshad was calm and in control of the scene when officers arrived, and there was otherwise no reasonable basis for harassing her, manhandling her, and arresting her. In other words, there is evidence that the officers' actions in wrongfully arresting Dr. Arshad, and disparately treating her, were objectively unreasonable, and summary judgment was therefore inappropriate. Appellants request that this Honorable Court GRANT this Petition for Writ of Certiorari, finding that there are issues of fact which preclude the entry of summary judgment, and REVERSE the rulings of the courts below.

2. ***There is an issue of fact as to the plaintiffs Excessive Force claim since the entire arrest was unlawful and therefore any force used was excessive***

The lower courts also erroneously dismissed

the excessive force claims of the Petitioners. The courts suggested that under the circumstances, the amount of force used to detain Dr. Arshad was reasonable. However, again, the court failed to take into account the numerous issues of disputed fact in reaching this conclusion. Whether or not the force used by officers was excessive, considering the testimony and evidence in the record, is an issue of fact that should be resolved by the trier of fact.

To prevail on an excessive force claim, a plaintiff must establish: "(1) injury (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Tarver*, 410 F.3d at 751; *Goodson*, 202 F.3d at 740. To state a claim for excessive use of force, the plaintiff's asserted injury must be more than *de minimis*. See *Glenn*, 242 F.3d at 314. The determination of whether a plaintiff's alleged injury is sufficient to support an excessive force claim is context-dependent and is "directly related to the amount of force that is constitutionally permissible under the circumstances." *Ikerd v. Blair*, 101 F.3d 430, 435 (5th Cir.1996); see *Williams v. Bramer*, 180 F.3d 699, 703 (5th Cir. 1999) ("In determining whether an injury caused by excessive force is more than *de minimis*, we look to the context in which that force was deployed.").

As stated above, there was never any probable cause to arrest Dr. Arshad at the time she was forcefully taken into custody by Officer Miller. She had committed no crime, and in fact was rendering

medical assistance to an injured pedestrian. As such, ANY amount of force was excessive under the circumstances.

After unlawfully dragging Dr. Arshad away from her patient, Officer Miller pinned her arm behind her back, swept her feet out from under her, took her down to the ground with great force, knelt on her back, and cuffed her hands behind her back. He then forcefully deposited her into the back seat of a nearby police cruiser, slammed the door, locking Dr. Arshad inside with the windows rolled up, and then left her there alone. Dr. Arshad died shortly thereafter. Clearly there was an injury, and the evidence strongly suggests that the injury was caused by the excessive force complained of.

Furthermore, ample evidence has been submitted that the force used was unreasonable. Dr. Arshad did nothing but perform a charitable public service to an injured pedestrian, and in return Officer Miller abused her and arrested her for performing that public service. Clearly, any force used to effect that arrest was unreasonable. At the very least, there is an issue of material fact to be resolved at trial. Therefore, the trial court erred in granting summary judgment on the issue of excessive force, and this Honorable Court should REVERSE that decision.

II. THE COURTS BELOW ERRED IN SUMMARILY DISMISSING PETITIONERS' EIGHTH AMENDMENT CLAIMS BECAUSE

EVIDENCE WAS PRESENTED THAT POLICE OFFICERS HAD ACTUAL KNOWLEDGE OF THE DANGER ASSOCIATED WITH ARRESTING A PERSON IN THE MANNER IN WHICH DR. ARSHAD WAS ARRESTED, AND THE KNOWLEDGE THAT SUCH AN ARREST PRESENTED A SUBSTANTIAL RISK OF DEATH, SUCH THAT OFFICERS ON THE SCENE ACTED WITH DELIBERATE INDIFFERENCE WITH REGARD TO THE RIGHTS OF DR. ARSHAD IN THEIR POST-CUSTODIAL CARE WHEN THEY LOCKED HER IN THE BACK OF THE POLICE CRUISER AND ABANDONED HER

The lower Courts also found, as a matter of law, that the officers did not violate Dr. Arshad's Eighth Amendment rights to be free from cruel and unusual punishment based on the arresting officers' deliberate indifference to her constitutional rights. In so holding, the Court of Appeal found that Officers Miller and Bright did not have subjective knowledge of a serious risk to Dr. Arshad's health when they locked her in the police cruiser and left her unattended. However, there is evidence that the officers DID know of the risks, by virtue of having read the Kenner Police Operations Manual, ***which practically predicted Dr. Arshad's death in this same type of situation***. As a direct result of the completely indifferent post-custodial actions of the defendant officers, Dr. Arshad was not only deprived of her civil rights, but also her life.

It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment. Furthermore, it is well established that an Eighth Amendment analysis applies to pre-trial detainees/arrestees. *Hare v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996). As this Honorable Court stated in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 199-200 (1989):

> "When the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being. . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs -- *e. g.*, food, clothing, shelter, medical care, and reasonable safety -- it transgresses the substantive limits on state action set by the Eighth Amendment. . . ."

Contemporary standards of decency require no less. *Estelle* v. *Gamble*, *supra*, at 103-104. In *Estelle*, the Court concluded that although accidental or inadvertent failure to provide adequate medical care

to a prisoner would not violate the Eighth Amendment, "deliberate indifference to serious medical needs of prisoners" violates the Amendment because it constitutes the unnecessary and wanton infliction of pain contrary to contemporary standards of decency. 429 U.S. at 104. *Wilson* v. *Seiter*, 501 U.S. , (1991), later held that a claim that the conditions of a prisoner's confinement violate the Eighth Amendment requires an inquiry into the prison officials' state of mind. "'Whether one characterizes the treatment received by [the prisoner] as inhuman conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the "deliberate indifference" standard articulated in *Estelle*.'" *Id.*, at (slip op., at 9).

For an individual defendant, a plaintiff "must establish that the official acted with subjective deliberate indifference" to the rights of the detainee/arrestee in order "to prove a violation of his constitutional rights." *Olabisiomotosho v. City of Houston*, 185 F.3d 521 (5th Cir. 1999). In order to prove that a defendant acted with subjective indifference, a plaintiff must merely show that "the official had subjective knowledge of a substantial risk of serious harm to a pretrial detainee but responded with deliberate indifference to that risk." *Id.*

In the present case, ample evidence was presented that the officers acted with deliberate indifference to the rights of Dr. Arshad once she was placed under arrest and thrown in the back of the

police cruiser. Evidence suggests that the officers had subjective knowledge of a substantial risk of serious harm to Dr. Arshad after they wrestled her to the ground, cuffed her, and threw her into the back of the police car, windows rolled up, with the doors locked, and then walked away. As set forth above, the testimony of the officers establishes that they disregarded every one of the rules set forth in their own Operations Manual, which warns against precisely this type of event. They placed Dr. Arshad in Officer Bright's police cruiser, with the windows all rolled up, and with the doors locked, and everyone just walked away, leaving her totally unattended for an extended period of time.

The operations manual clearly states that the reason for the precautions described therein is to avoid positional asphyxia. In fact, Part 4 of the manual is entitled "Discussion on Positional Asphyxia," and reads, in pertinent part:

> There are a number of variables which appear to be associated with in-custody deaths attributed to positional asphyxia:
> ... Violent struggle extreme enough to require the officers to employ some type of restraint technique.
> ... Unresponsiveness of subject during or immediately after a struggle. Such unresponsive behavior may indicate cardiopulmonary arrest and the need for immediate medical attention.

Once Officer Miller unlawfully arrested Dr. Arshad, wrestled with her, slammed her face first into the ground, mounted her back, and cuffed her, which clearly counts as "extreme physical exertion", especially in an obese lady, he immediately shoved her in the police cruiser, which is also expressly warned against in the manual.. However, the Operations Manual, read and possessed by all uniformed officers, was developed to ensure the safety of arrestees/detainees, and was completely ignored in this case, causing exactly the type of problem predicted by the manual. There is therefore at least an issue of fact as to the officers' subjective knowledge that their actions created a substantial risk of harm to Dr. Arshad.

The police officers are presumed to have read their own manual, and therefore they are presumed to have knowledge of a substantial risk to arrestees detained in the manner in which Dr. Arshad was detained. Miller suggests that he took Dr. Arshad down due to her violent resistance. He then mounted her back and cuffed her. Then, he states that she became quiet and calm immediately after the struggle, which suggests that she may have been in distress. However, no action was taken to ensure Dr. Arshad's safety. She was not monitored, she was not allowed adequate ventilation, she was not examined by medical personnel (even though EMTs were on the scene), and she was not even allowed to catch her breath before she was shoved in the police car and locked in with the windows rolled up and her arms cuffed tightly behind her back. She therefore

suffered positional asphyxia, exactly as the Manual predicted.

The lower Courts improperly made the ***assumption*** that the defendants' evidence was correct, suggesting that Dr. Arshad died from a heart attack, despite the fact that appellants presented contradictory and competent evidence that she, in fact, died from positional asphyxia. The Court suggested that officers did not know that Dr. Arshad had a pre-existing heart condition, and that she was in no apparent distress when they arrested her. However, this ignores the evidence presented, especially the evidence by Petitioners' medical expert that suggests Dr. Arshad's "cardiopulmonary event" was brought on by positional asphyxia. The lower courts should not have disregarded the Petitioners' evidence in this regard.

The evidence is clear that there are precautions to avoid positional asphyxia, and these police officers failed to take ANY of these precautions, knowing full well what could happen if they did. Thus, these officers acted with deliberate indifference. They had subjective knowledge of a substantial risk to the health and safety of Dr. Arshad if they did not watch her and care for her, yet they intentionally chose to abandon her in the police car. At the very least, there is an issue of material fact concerning the officers' subjective knowledge of a substantial risk of serious harm to Dr. Arshad, which the lower Courts chose to ignore wholesale. The courts below chose to try this case on its merits,

finding facts, weighing credibility, and finding in favor of the defendants, despite the volumes of evidence presented by the Petitioners. Therefore, Petitioners request that this Honorable Court REVERSE the rulings of the lower courts in this matter, and allow the Arshad's their constitutional right to a day in court.

III. THE COURTS BELOW ERRED IN SUMMARILY DISMISSING PETITIONERS' CIVIL RIGHTS CLAIMS UNDER 28 U.S.C. §1983, UNDER THE *MONELL* FRAMEWORK, AND THE LOWER COURTS IMPROPERLY WEIGHED CONTRADICTORY EVIDENCE IN FINDING THAT THERE WAS NO OFFICIAL POLICY AND/OR CUSTOM OF THE CITY OF KENNER IN ARRESTING PHYSICIANS AT ACCIDENT SCENES

The Lower Courts also found that there was insufficient evidence to establish Petitioners' *Monell* claim. In so holding, the Court found that there was no evidence that Officer Miller had knowledge of a letter from the Chief of Police to Michael Zito stating that physicians at accident scenes have been arrested in the past and will continue to be arrested in the future. The Court stated that this "alleged policy itself did not violate federal law..." However, appellants insist that the policy DOES violate federal law, in that it is a policy to arrest a certain class of individuals without probable cause, in violation of the Fourth and Fourteenth Amendments! Additionally, the appellants presented evidence that

the letter establishing this policy was disseminated to the Mayor of Kenner and to all of the ranking officers and supervisory employees of the Kenner Police Department, which creates a very reasonable inference that Officer Miller had knowledge of the letter and the illegal policy. The only evidence presented that refutes this inference is Miller's own self-serving testimony that he did not know of the policy. ***The Court clearly took Officer Miller, the defendant police officer himself, at his word*** in finding that he had no knowledge of the policy, which Petitioners insist is an improper weighing of evidence and credibility, and is wholly inappropriate in ruling on a motion for summary judgment.

In *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 692 (U.S. 1978), the Court held that a local government may not be held liable under *respondeat superior* for constitutional torts committed by a municipal employee. However, "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . the government as an entity is responsible under §1983 ." 436 U.S. at 694, 98 S.Ct. at 2037-38. *Monell* set a high threshold for causation, requiring that the plaintiff establish that the municipal policy be the "moving force" behind the constitutional violation. *Id.*

The Supreme Court in *Monell* wrote that practices of officials may become "so permanent and

well settled as to constitute a 'custom or usage' with the force of law." 436 U.S. at 690-91, 98 S.Ct. at 2036 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68, 90 S.Ct. 1598, 1613-14, 26 L.Ed.2d 142 (1970)). For example, in *Adickes*, a white school teacher was denied service at a lunch counter because she was in the company of blacks. The Court held that Adickes presented evidence of a claim under § 1983 for a deprivation of rights because service was refused under color of law, i.e., a state-enforced custom of segregation in public eating places. *Adickes*, 398 U.S. at 173-74, 90 S.Ct. at 1617.

Generally, sufficient duration or frequency of abusive practices, or other evidence, must warrant a finding of knowledge on the part of the governing body that the objectionable conduct has become customary practice of city employees. However, where the violations are flagrant or severe, the fact finder will likely require a shorter pattern of the conduct to be satisfied that diligent governing body members would necessarily have learned of the objectionable practice and acceded to its continuation. *Bennett v. City of Slidell*, 728 F.2d 762 (C.A. La. 1984).

In fact, in *Leite v. City of Providence*, 463 F.Supp. 585, 590 (D.R.I.1978), the court stated:

> [C]itizens do not have to endure a "pattern" of police misconduct before they can sue the city under section 1983. If a municipality

> completely fails to train its police force, or trains its officers in a reckless or grossly negligent manner so that future police misconduct is almost inevitable, the municipality exhibits a "deliberate indifference" to the resulting violations of a citizen's constitutional rights. In such a case, the municipality may fairly be termed as acquiescing in and implicitly authorizing such violations.
>
> A city may well have a policy with respect to police recruitment and training that is itself unconstitutional and injurious, but occasional acts of untrained policemen are not otherwise attributed to city policy or custom. We have characterized cases such as *Herrera v. Valentine*, 653 F.2d 1220, 1224 (8th Cir.1981), and *Owens v. Haas*, 601 F.2d 1242, 1246-47 (2d Cir.), cert. denied, 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979), as the "most expansive" view of *Monell*. *Berry v. McLemore*, 670 F.2d at 33.

In the present case, there is evidence, in the form of a letter, dated June 20, 2003, from Police

Chief Nick Congemi to Fire Chief Michael Zito which states, unequivocally that the Kenner Police Department has arrested doctors who have attempted to render aid in the past, and will continue to do so in the future. This letter veritably ***proves*** that the Kenner Police Department had a policy, or at least a custom, of falsely arresting physicians at an accident scene, and Petitioners insist that nothing more is needed to show a policy or custom, since this is an actual written policy of the Chief of Police! Nick Congemi seemed very proud of this decree, and it was promulgated to ***all*** of the top brass in the Kenner Police Department. Thus, this letter provides ***significant*** evidence of an official policy of unlawfully arresting licensed physicians when they "interfere" with a medical scene. At the very least it creates an issue of material fact to be decided by a trier of fact.

Furthermore, the verified Petition of Hassan Abdallah, who is a licensed physician, was entered into evidence. Dr. Abdallah was the victim of a similar unwarranted attack in 2000, when he was trying to render emergency medical service to a severely injured accident victim. For simply trying to inform EMT's of possible complications, Dr. Abdallah was thrown down, pepper sprayed, and arrested, and later denied, for an extended time, medical care when he had an allergic reaction to the pepper spray. Thus, this was an actual episode where a physician, again trying to render aid to an injured patient, was unlawfully arrested and abused by Kenner Police officers for no other reason than

that he was a non-white physician.

Either piece of evidence, taken by itself, creates an issue of fact as to whether the Kenner Police Department had a *de facto* policy of unlawfully arresting and harassing licensed physicians at accident/medical scenes. When taken together, clearly there is ample evidence for the trier of fact to find that the City of Kenner and Nick Congemi are liable under 42 U.S.C. 1983 pursuant to the *Monell* framework. However, the lower courts refused to take any of this evidence into account, and dismissed the appellants' *Monell* claims. Summary Judgment was clearly improper on this claim as well, and Petitioner request that this Court REVERSE the rulings of the Courts below.

CONCLUSION

There is abundant evidence in the record establishing the liability of the defendants/ respondents pursuant to 18 U.S.C. §1983. There is evidence that the Kenner Police officers unlawfully arrested Dr. Arshad. There is evidence that the Kenner Police officers used excessive force in attacking Dr. Arshad, dragging her away from her patient, knocking her face-down on the ground, kneeling on her back, and cuffing her hands behind her back. There is evidence that once the police officers unlawfully arrested Dr. Arshad, they acted with deliberate indifference to her constitutional rights by throwing her in the back seat of a police

car, leaving the windows rolled up and the doors locked, when they knew or should have known that their actions caused substantial risk to her health and safety. And there is evidence that the City of Kenner and the Kenner Police Department had an official policy of summarily and unlawfully arresting physicians who were present at accident scenes. The lower courts were presented with all this evidence, yet the courts improperly weighed the evidence in favor of the defendants. Clearly there are numerous issues of material fact in this matter, and summary judgment is improper. For all the foregoing reasons, Petitioners respectfully request that this Honorable Supreme Court GRANT petitioners' Petition for Writ of Certiorari, REVERSING the United States Court of Appeal for the Fifth Circuit and REVERSING the judgment of the United States District Court for the Eastern District of Louisiana, the Honorable Jay C. Zainey.

Respectfully submitted,

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APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-30061

KALEEM ARSHAD, Dr., Individually and on behalf of decedent, Dr. Jameela Arshad; NADEEM S. ARSHAD, individually and on behalf of decedent, Dr. Jameela Arshad

Plaintiffs – Appellants

v.

NICK CONGEMI, in his capacity as Chief of Police for the City of Kenner; KENNER CITY; KENNER POLICE DEPARTMENT; GERALD MILLER, Officer; RYAN KRUMMEL, Officer; KIMBERLYN BRIGHT, Officer; EMILE SANCHEZ, Sergeant; GEMINI INSURANCE COMPANY; CLARENDON AMERICA INSURANCE COMPANY

Defendants – Appellees

Appeal from the United States District Court for the Eastern District of Louisiana at New Orleans

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Before JOLLY, DAVIS and DeMOSS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

The Plaintiffs-Appellants, Dr. Kaleem Arshad and Nadeem S. Arshad ("theArshads"), appeal from the district court's grant of summary judgment in favor of the Defendants-Appellees, dismissing with prejudice the Arshads' federal claims and certain state law claims and dismissing without prejudice the Arshads' remaining state law claims.

I. FACTS

On January 10, 2005, at approximately 10:00 p.m., Dr. Jameela Arshad, a black female and licensed physician, was driving in New Orleans near the intersection of Williams Boulevard and West Esplanade when she witnessed a vehicle strike a young boy on a bicycle. She stopped her vehicle and went to the boy's side. Another civilian in plain clothes arrived at the scene about the same time—Robert Evans, a white male claiming to be an emergency medical technician ("EMT"). In an apparently heated exchange, Evans asked to see Dr. Arshad's credentials, and she informed him that she was a physician and that it was "her scene."

The next person to arrive on the scene was Officer Ryan Krummel, an off-duty Kenner Police officer. Dr. Arshad informed him, too, that she was a physician and that it was "her scene." Officer Krummel testified that Evans told him Dr. Arshad did not have any proof that she was a physician. Officer Krummel also testified that he told Evans and Dr. Arshad not to touch the boy, but, while he didn't know "if she was going to render aid or grab the juvenile, . . . [Dr. Arshad] made attempts, or motions, towards the juvenile."

Next, Kenner Police Officer Gerald Miller reported to the scene and did not note anything unusual on his arrival. He recognized Officer Krummel but not Evans or Dr. Arshad. Officer Miller testified that Evans immediately informed him that Dr. Arshad claimed she was a physician but would not present her credentials. Officer Miller asked Dr. Arshad to present them, but she said she did not have them with her. Officer Miller then told her that she could not touch the boy and repeatedly ordered her to step away from the scene, but she refused and became increasingly agitated. No one asked Evans for his credentials at any point, and Officer Miller admitted that he never told Evans to step away.

Dr. Arshad turned back to the boy and attempted to place her hands on him. Officer Miller testified that he "didn't know what her intentions were" but "never saw her trying to

harm the patient." Officer Miller then grabbed her arm, claiming in later testimony that she had committed the crime of "failure to obey lawful orders" and was possibly "attempting to commit a battery on the victim." Dr. Arshad physically resisted Officer Miller, pulled away from him, and turned back to the boy.

Officer Miller then pulled her away from the boy again, and a scuffle ensued. When Dr. Arshad continued to struggle, Officer Miller swept her legs out from under her, pinned her to the ground face-first, knelt on her back, and cuffed her hands behind her back. Dr. Arshad reportedly became calm and complacent immediately after being handcuffed. Officer Miller then placed her in the back of a police cruiser of Officer Kimberlyn Bright, who had recently arrived on the scene. She was locked in the car alone with the windows rolled up, and at least one witness reported that she began kicking at some point after being placed in the car.

Both Officers Miller and Bright (who had the only set of keys to the car) walked away from the locked car. Several minutes later, Officer John Louis was passing by Officer Bright's car and noticed that Dr. Arshad appeared to be foaming at the mouth. Thinking she had been pepper-sprayed, he began asking other officers who had done so. Someone radioed Officer Bright, who returned from across the street to unlock the car. It is unclear how much time had passed between

the time Dr. Arshad was placed in the car and when she received medical attention, but evidence suggests between five and nine minutes passed. She was removed from the car as soon as it was unlocked, but she was unresponsive, and attempts to revive her were unsuccessful. The cause of death was later determined to be a cardiopulmonary arrest.

In this suit, commenced January 6, 2006, the Arshads, Dr. Arshad's surviving husband and son, sued Nick Congemi, in his official capacity as Chief of Police for the City of Kenner; the City of Kenner; Kenner Police Department; Gemini Insurance Company; and Clarendon America Insurance Company (collectively, "the City"). The Arshads also sued Officers Miller, Krummel, and Bright; Sergeant Emile Sanchez, and Robert Evans ("the individual defendants"), all in their individual capacities.

The Arshads asserted state law tort claims and federal claims against the individual officers and Evans under 42 U.S.C. § 1983 for violating Dr. Arshad's Fourth, Eighth, and Fourteenth Amendment rights, specifically relating to the alleged false arrest, use of excessive force, and cruel and unusual punishment (deliberate indifference). They also asserted § 1983 claims against the City based on an alleged custom or policy of arresting licensed physicians at the scene of accidents without probable cause.

On October 15, 2007, following their answers which asserted qualified immunity, the defendants filed motions for summary judgment. Evans argued that he had not acted under color of state law and so was not subject to a § 1983 action, nor was he liable under the tort claims. The City and the other individual defendants argued that (1) the arrest of Dr. Arshad had been lawful and had not violated her constitutional rights; and (2) the Arshads had failed to show a custom or policy in place that led to a violation of her constitutional rights.

At a hearing on December 12, 2007, the district court granted the defendants' motions, as formalized in a December 13, 2007 written judgment. The court granted summary judgment on all § 1983 claims against the individual defendants based on qualified immunity. The court specifically found that Dr. Arshad's rights with respect to excessive force and deliberate indifference had not been violated, but it made no such determination on the right to be free of false arrest. The court also granted summary judgment on the *Monell* claim against the City after it determined the Arshads' evidence was insufficient to show a custom or policy.

In addition to dismissing the § 1983 claims against Evans, the court dismissed the state law tort claims against him with prejudice; as a result, no claims against Evans remain. With respect to the remaining state law claims against the other

defendants, the court declined to exercise supplemental jurisdiction and dismissed those claims without prejudice.

The Arshads now appeal, attacking the dismissal with prejudice of the federal claims and the dismissal without prejudice of the state law claims against the defendants other than Evans. The Arshads do not attack the dismissal with prejudice of the state law claims against Evans.

II. JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction over the § 1983 claims under 28 U.S.C. § 1331, and jurisdiction over the supplemental state law claims under 28 U.S.C. § 1367. We have jurisdiction over the district court's final judgment pursuant to 28 U.S.C. § 1291.

"We review the district court's grant of summary judgment *de novo*, applying the same standard as the district court." *Environmental Conservation Organization v. City of Dallas*, 529 F.3d 519, 524 (5th Cir. 2008) (citing *Greenwell v. State Farm Mut. Auto. Ins. Co.*, 486 F.3d 840, 841 (5th Cir. 2007)). *See* FED. R. CIV. P. 56.

III. LAW AND ANALYSIS

A. § 1983 Claims

The district court dismissed all of the § 1983 claims against the individual defendants based on qualified immunity. Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

> Whether a government official is entitled to qualified immunity "generally turns on the 'objective reasonableness of the action' assessed in light of the legal rules that were 'clearly established' at the time it was taken." The law is deemed to be clearly established if the contours of a right asserted are sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . *If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity.* Whether the conduct of which the plaintiff complains violated clearly established law is an essentially legal question.

White v. Taylor, 959 F.2d 539, 544 (5th Cir. 1992) (citations omitted) (emphasis added). "It is important to emphasize that this inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau*

v. Haugen, 543 U.S. 194, 198–200 (2004) (quotation marks omitted).

More concretely: "To rebut the qualified immunity defense, the plaintiff must show: (1) that he has alleged a violation of a clearly established constitutional right, and (2) that the defendant's conduct was objectively unreasonable in light of clearly established law at the time of the incident. We review the district court's grant of qualified immunity de novo." *Waltman v. Payne*, 535 F.3d 342, 346 (5th Cir. 2008) (footnote omitted). We have discretion "in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, — U.S. —, 129 S. Ct. 808, 818 (2009).

False Arrest

Under the first part of the qualified immunity test, "[t]he right to be free from arrest without probable cause is a clearly established constitutional right." *Mangieri v. Clifton*, 29 F.3d 1012, 1016 (5th Cir. 1994). "For warrantless arrests, the test for whether the 'police officer ha[d] probable cause to arrest [is] if, at the time of the arrest, he had knowledge that would warrant a prudent person's belief that the person arrested had already committed or was committing a crime.'" *Id.* (quoting *Duckett v. City of Cedar Park*, 950 F.2d 272, 278 (5th Cir. 1992)).

Police officers who "reasonably but mistakenly conclude that probable cause is present" are entitled to qualified immunity. *Hunter v. Bryant*, 502 U.S. at ----, 112 S.Ct. at 536 (quoting *Anderson* [*v. Creighton*], 483 U.S. at 641, 107 S.Ct. at 3040). . . . Similarly, "[t]he Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released." *Baker v. McCollan*, 443 U.S. 137, 145, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433 (1979).

* * *

The subjective beliefs of [the officers] as to what facts they relied upon in forming the probable cause to arrest . . . are irrelevant to the objective reasonableness of their actions. *Anderson*, 483 U.S. at 641, 107 S.Ct. at 3040. The issue here is an "objective (albeit fact specific) question whether a reasonable officer could have believed" that he was violating a person's constitutionally protected rights under the circumstances of the complained of action. *Id.* For this reason, we have held that "[e]ven if there was not probable cause to arrest

> the plaintiff for the crime charged, proof of probable cause to arrest the plaintiff for a related offense is also a defense" to a false arrest section 1983 claim. [*Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990)].

Id. at 1017.

The district court did not specifically find that Officer Miller actually had probable cause to arrest Dr. Arshad. The court's finding of qualified immunity was premised on its determination that Officer Miller was not objectively unreasonable in concluding that there was probable cause. We agree. Although the scene appeared normal when Miller first got there, the situation quickly escalated when Officer Miller ordered Dr. Arshad, dressed in plainclothes, to present identification. Dr. Arshad repeatedly refused to move; refused to present identification; became agitated; insisted several times that it was her scene; and attempted to place both hands on the boy. Only after all of that had occurred did Officer Miller grab her arm, effecting an arrest. Miller later testified that he thought she may have been about to commit a battery on the boy. Even if he ultimately lacked probable cause, it is hard to say that his belief is objectively unreasonable in light of the chaos of the accident scene.

Moreover, although not argued by the Defendants-Appellees, a reasonable officer could have believed there to be probable cause under a Louisiana criminal statute which provides, in relevant part: "Interference with medical treatment is the intentional and willful interference with a[n] . . . emergency medical technician . . . in the performance of their duties relating to the care and treatment of patients . . . at the scene of a medical emergency." LA. REV. STAT. ANN. § 14:332(A) (2005). Assuming a reasonable officer could have believed that Evans—who was not in a medical uniform or presenting identification, but who was holding the boy's head and otherwise acting as if he was in control—was an EMT and that Dr. Arshad was simply an unidentified stranger interfering with the boy's medical treatment, this statute could conceivably give rise to probable cause.

In short, in light of the chaos of the scene and Dr. Arshad's refusal to present identification, a reasonable officer could have concluded that probable cause existed to arrest her. Thus Officer Miller and the other individual defendants are entitled to qualified immunity on the false arrest claim.

Excessive Force

The Supreme Court discussed claims of excessive force in both *Graham v. Connor*, 490 U.S. 386 (1989), and *Saucier v. Katz*, 533 U.S. 194

(2001), firmly establishing that we examine the objective reasonableness of the officer's actions not with the benefit of hindsight but in light of the "on-scene perspective" of the officer. *Saucier*, 533 U.S. at 205 (citing *Graham*, 490 U.S. at 393, 396, 397).

> To determine the objective reasonableness of an officer's use of force, "[w]e pay 'careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers or others, and whether he [was] actively resisting arrest or attempting to evade arrest by flight.'" *Gutierrez v. City of San Antonio*, 139 F.3d 441, 447 (5th Cir. 1998) (alteration in original) (quoting *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)).

Tarver v. City of Edna, 410 F.3d 745, 753 (5th Cir. 2005).

As the Supreme Court recognized in *Saucier*, "[a]n officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is

reasonable, however, the officer is entitled to the immunity defense." *Saucier*, 533 U.S. at 205. "Qualified immunity operates . . . to protect officers from the sometimes 'hazy border between excessive and acceptable force,' *Priester v. Riviera Beach*, 208 F.3d 919, 926–927 (C.A.11 2000), and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier*, 533 U.S. at 206.

The Arshads argue that the arrest was unlawful and that the use of any force was therefore excessive. However, we have already found that Officer Miller was objectively reasonable in believing probable cause existed to arrest Dr. Arshad. Thus, we must determine whether the use of force was excessive or objectively unreasonable in light of that objectively reasonable arrest. It is undisputed that Dr. Arshad forcibly resisted Officer Miller after he grabbed her arm. Under *Graham*, we must consider the fact that Dr. Arshad was resisting arrest.

We must also consider the fact that Dr. Arshad suffered only minor, superficial injuries, such as scrapes, in the forcible arrest itself. She calmed down as soon as she was handcuffed and was able to walk and talk on her way to being put in the police car. It was only in the police car several minutes after her arrest that Dr. Arshad suffered a cardiopulmonary arrest. Even if we were to draw a connection between those two

events, we must focus on the force Officer Miller actually used, not just on the ultimate consequence, as illustrated by *Gregory v. County of Maui*, 523 F.3d 1103 (9th Cir. 2008).

In *Gregory*, the Ninth Circuit found that police officers had not used excessive force when a trespasser died of a cardiopulmonary arrest shortly after being forcibly arrested by three officers. *Id.* at 1105. The trespasser had been excitedly wielding a pen as a weapon; the officers verbally ordered him to drop the pen; and when he refused, the officers wrestled him to the ground and handcuffed him. *Id.* Throughout the struggle, he kept shouting that he couldn't breathe but continued to fight the officers. *Id.* When the officers finally handcuffed him, they discovered that he was not breathing and were unable to resuscitate him. *Id.* The cause of death was determined to be a heart attack caused in part by a preexisting heart condition; it was also determined that he had not been choked in the struggle. *Id.*

The district court dismissed the claims against the officers on the basis of qualified immunity, and the Ninth Circuit affirmed, noting the trespasser's reported behavior prior to the officers' arrival, his erratic behavior throughout the confrontation, his repeated refusal to drop the pen, his resistance when they tried to disarm him, the officers' resorting to physical confrontation only after verbal requests, and the lack of evidence

that the officers struck the trespasser or used weapons. 523 F.3d at 1106–07. The court concluded:

> Accordingly, although the confrontation came to a tragic end, we must conclude that the officers did not use excessive force. The severity of [the trespasser's] trespass and of the threat he posed were not overwhelming, but we are satisfied that the force used by the officers was proportionate to both. The Fourth Amendment does not require more. *See Forrester v. City of San Diego*, 25 F.3d 804, 807-08 (9th Cir. 1994) ("Police officers ... are not required to use the least intrusive degree of force possible ... [T]he inquiry is whether the force that was used to effect a particular seizure was reasonable.").

Id.

Here, Officer Miller had been called to the scene because of the accident, not because of Dr. Arshad's presence, and nothing appeared to be out of the ordinary upon his arrival. However, the situation escalated quickly as soon as Officer Miller asked Dr. Arshad to present her credentials. It is clear that Officer Miller first attempted to rely on verbal orders, but Dr. Arshad repeatedly refused to comply by presenting her

credentials, refused to step away from the boy, continued to assert that it was her scene, and grew increasingly agitated. Only then did Miller attempt to arrest her simply by pulling her away by her arm, but she physically resisted arrest. In light of Dr. Arshad's behavior and her resistance to less forcible methods, it was not objectively unreasonable to use a forcible takedown to effect her arrest. That is especially true in light of the fact that she sustained, at most, only minor scrapes and bruises in the takedown itself and, unlike in *Gregory*, showed no signs of cardiopulmonary arrest—even shortness of breath—during or immediately after the struggle.

The district court correctly concluded that Officer Miller's use of force was not excessive under the Fourth Amendment and that his actions were not objectively unreasonable. Accordingly, Officer Miller and all other individual defendants are entitled to qualified immunity on the excessive force claim.

Deliberate Indifference

The Arshads assert deliberate indifference claims under the Eighth and Fourteenth Amendments for Dr. Arshad's post-arrest death following her cardiopulmonary arrest. It is clear that deliberate indifference claims are available under the Eighth and Fourteenth Amendments even to pretrial detainees like Dr. Arshad, but the state actor's "liability for episodic acts or omissions

cannot attach unless the official had subjective knowledge of a substantial risk of serious harm to a pretrial detainee but responded with deliberate indifference to that risk." *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 650 (5th Cir. 1996) (en banc). "[T]he correct legal standard is not whether the . . . officers 'knew or should have known,' but whether they had gained actual knowledge of the substantial risk of [serious harm] and responded with deliberate indifference." *Id.*

The Arshads have presented no evidence that the officers actually knew of her heart condition (indeed, it appears that no one, including Dr. Arshad, knew of the condition) or that she was having any problems breathing or with chest pain after being handcuffed. Though there is some dispute as to her exact behavior, there is no question that she was able to breathe, talk, and walk immediately after being handcuffed. Thus, there is no indication that the officers knew based on Dr. Arshad's actual behavior that there was any substantial risk of serious harm; she showed no such indications.

The Arshads argue that the Kenner Police Department's Operations Manual is sufficient to show subjective knowledge of a substantial risk of serious harm because it contains statements instructing officers not to place prisoners "in a hot or closed up vehicle"; to allow an arrestee to regain his or her breath "[i]n situations involving extreme physical exertion"; and "not [to] leave the prisoner

unattended in a closed vehicle . . . ." These provisions are insufficient to show the requisite subjective knowledge. This is especially true given that the temperature was approximately 65 degrees Fahrenheit (and thus reasonably comfortable) at the time of the incident, and Dr. Arshad was in no apparent distress immediately following her arrest.

The district court properly concluded that the individual defendants had not been deliberately indifferent in violation of Dr. Arshad's Eighth and Fourteenth Amendment rights, and their actions were not objectively unreasonable. Consequently, the individual defendants are entitled to qualified immunity on the deliberate indifference claim.

Monell Claim

The Arshads also assert a § 1983 claim, under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), that the City had a custom or policy of arresting physicians at the scene of an accident. Because "governmental entities are not entitled to qualified immunity," we would ordinarily need to determine first whether Dr. Arshad's constitutional rights were actually violated. *Gates v. Texas Dept. of Protective and Regulatory Services*, 537 F.3d 404, 436 (5th Cir. 2008). Here, however, the district court did not make a specific determination as to whether the arrest was unconstitutional, nor must we, because, even if we

assume a constitutional violation, the Arshads fail to present sufficient evidence of a custom or policy by the City to support a *Monell* claim.

> It is well established that governmental liability under § 1983 must be premised on a government policy or custom that causes the alleged constitutional deprivation. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). A policy may be a policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the government's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority. *Burge v. St. Tammany Parish*, 336 F.3d 363, 369 (5th Cir. 2003). A custom is shown by evidence of a persistent, widespread practice of government officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents government policy. *Id.*

Id.

It is clear the Arshads cannot show that there was a custom because they have failed to show "a persistent, widespread practice" of false arrests by the City. *Id.* The Arshads point to only one similar previous incident: In 2000, Kenner Police officers pepper-sprayed, arrested, and removed from the scene one Dr. Abdallah while he was tending to the victim of an accident he witnessed. Other than the Dr. Abdallah incident, the only evidence the Arshads submit to show a policy is a letter from Police Chief Congemi to Fire Marshal Michael Zito on June 20, 2003. In that letter, after noting that East Jefferson General Hospital EMTs "have superior knowledge of to whom they should then surrender responsibility" at accident scenes, Congemi stated that "we have arrested licensed doctors who have attempted to interfere with [EMTs] . . . [and] will continue to do so in order to protect the victims and technicians."

The Arshads concede that there was nothing in the City's official policy manual suggesting that this was the City's official policy, and they have produced no testimony to that effect, but they argue that the Congemi letter and the Dr. Abdallah incident are sufficient to show a de facto policy. As a matter of law, this evidence, without more, is insufficient to demonstrate a policy or custom so as to make out a *Monell* claim.

> [I]t is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the

> municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

Bd. of County Comm'rs v. Brown, 520 U.S. 397, 404 (1997) (emphasis in original).

> Causation bears on implementing the rule against attributed liability under § 1983, insisting as it does that the local government unit itself be the actor. . . . It follows that when the claim is that while a municipal policy itself did not violate federal law, it caused another actor to inflict the injury, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee.

Victoria W. v. Larpenter, 369 F.3d 475, 482 (5th Cir. 2004) (footnotes and internal quotation marks omitted).

Here we have the type of situation envisioned by *Victoria W.*, where "the [alleged] policy itself did not violate federal law [but] caused another actor [Officer Miller] to inflict the injury," so we must apply "'rigorous standards of culpability and causation.'" 369 F.3d at 482 (quoting *Bryan County*, 520 U.S. at 405). The Arshads have produced no evidence showing that Officer Miller knew of the letter or had other knowledge of a policy of illegally arresting licensed physicians. That failure is fatal to the causation element of their *Monell* claim. *See, e.g., Batista v. Rodriguez*, 702 F.2d 393, 399 (2d Cir. 1983) ("[T]he record before us . . . contains no proof of causation, i.e., that the police officers were executing a City policy. . . . [T]here is no evidence in the record furnished to us that [the] officers . . . knew of [prior] incidents or were aware of any City policy condoning police violations of civil rights."). There is simply nothing to show that Officer Miller acted pursuant to City policy, and to hold the City responsible for his actions would impose *respondeat superior* liability for Officer Miller's actions—a result barred by § 1983. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989).

Because the Arshads have presented no evidence showing that the City was the "moving force" behind the alleged constitutional violations, *Bryan County*, 520 U.S. at 404, we are satisfied that the district court correctly concluded the Arshads presented insufficient evidence of a

custom or policy under *Monell*, a necessary predicate to visit liability on the City.

State Law Claims

The district court had subject matter jurisdiction over the Arshads' § 1983 claims pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. Section 1367(c)(3) specifically provides: "(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if — . . . (3) the district court has dismissed all claims over which it has original jurisdiction . . . ." Such a decision is subject to review only for abuse of discretion. *Priester v. Lowndes County*, 354 F.3d 414, 425 (5th Cir. 2004). Because we find that the district court did not err in dismissing the Arshads' federal claims with prejudice, we also find that the district court did not err in declining to exercise supplemental jurisdiction over the related state law claims. We affirm the dismissal without prejudice of those claims.

CONCLUSION

For the above reasons, the district court's judgment is affirmed.

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-30061

KALEEM ARSHAD, Dr., Individually and on behalf of decedent, Dr. Jameela Arshad; NADEEM S. ARSHAD, individually and on behalf of decedent, Dr. Jameela Arshad

Plaintiffs – Appellants

v.

NICK CONGEMI, in his capacity as Chief of Police for the City of Kenner; KENNER CITY; KENNER POLICE DEPARTMENT; GERALD MILLER, Officer; RYAN KRUMMEL, Officer; KIMBERLYN BRIGHT, Officer; EMILE SANCHEZ, Sergeant; GEMINI INSURANCE COMPANY; CLARENDON AMERICA INSURANCE COMPANY

Defendants – Appellees

Appeal from the United States District Court for the Eastern District of Louisiana at New Orleans

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ON PETITION FOR REHEARING

Before JOLLY, DAVIS and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

s/ Eugene Davis
United States Circuit Judge

Dated: April 14, 2009

APPENDIX 3

MINUTE ENTRY
ZAINEY, J.
DECEMBER 12, 2007

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KALEEM ARSHAD, ET AL	CIVIL ACTION
VERSUS	NO: 06-0059
NICK CONGEMI, ET AL	SECTION: "A"

CIVIL MOTIONS

COURT REPORTER: Toni Tusa
COURTROOM DEPUTY: James Crull
LAW CLERK: Pam Turgeau

APPEARANCES: Patrick Hufft and Aub Ward, Counsel for plaintiff Samuel Gabb, Marianne Pensa, Michael Remondet, Jr., Counsel for defendants

Oral Argument.
(#54) Motion for Summary Judgment by Clarendon & Congemi, et al defendants:

The City of Kenner is dismissed with prejudice. Police Chief Congemi and Officers Miller, Krummel, Bright and Sanchez are dismissed with prejudice as to plaintiff's federal claims and dismissed without prejudice as to plaintiff's state claims.

(#57) Motion for Summary Judgment by Evans: Robert Evans, Jr. is dismissed with prejudice as to federal and state claims.

IT IS FURTHER ORDERED that (#62) Motion in Limine, (#63) Motion in Limine and (#71) Motion in Limine are dismissed as moot.

Exhibit (#P1)(DVD) admitted.

Court adjourned 4:50 p.m.

APPENDIX 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KALEEM ARSHAD, ET AL	CIVIL ACTION
VERSUS	NO: 06-0059
NICK CONGEMI, ET AL	SECTION: "A"

JUDGMENT

For the reasons given orally following a hearing on motions, accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, City of Kenner, Kenner Police Department, Nick Congemi, Gerald Miller, Ryan Krummel, Kimberlyn Bright, Emile Sanchez, Robert Evans, Jr., Gemini Insurance Company and Clarendon America Insurance Company, and against plaintiffs, Kaleem Arshad and Nadeem S. Arshad, individually and on behalf of decedent, Jameela Arshad, dismissing plaintiffs' complaint (dismissal is without prejudice as to the state law claims against defendants City of Kenner, Kenner Police Department, Nick Congemi, Gerald Miller,

Ryan Krummel, Kimberlyn Bright, and Emile Sanchez).

December 13, 2007

s/ Jay c. Zainey
JAY C. ZAINEY
UNITED STATES DISTRICT JUDGE